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NO. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 2003

PHONOMETRICS, INC. and
JOHN P. SUTTON,

Petitioners,

v.

HOSPITALITY FRANCHISE SYSTEMS INC., BENCHMARK HOSPITALITY, INC., GROSVENOR HOTELS GROUP, FAIRMONT HOTEL MANAGEMENT CO., and RHI HOTELS, INC.

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the refusal to correct a clerical mistake in a Notice of Appeal a denial of Due Process under the Fifth Amendment to the United States Constitution?

2. Did Phonometrics intend to appeal the *Hospitality Franchise* decision on the Joint Motion for Awards of Attorney Fees or did it intend to appeal only as to one or two of the awards by the district court?

3. Did the *Hospitality Franchise* defendants have fair notice of the appeal?

4. Is it an abuse of discretion to hold that the clerical mistake of omitting the word and number "and 10" between "February 5" and "2003" in a Notice of Appeal was a "jurisdictional" defect that is "not a mistake and not correctable"?

CORPORATE DISCLOSURE STATEMENT

Petitioner Phonometrics, Inc., is a Florida corporation. There are no parent corporations. No publicly held company owns 10% of Phonometrics, Inc.

Petitioner Sutton is a California attorney not related to any corporation.

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PETITION FOR A WRIT OF CERTIORARI

Phonometrics, Inc. and John P Sutton, its attorney who has been sanctioned, pray for a writ of certiorari to the United States Court of Appeals for the Federal Circuit in this patent case.

OPINIONS BELOW

The district court granted an award of attorney fees on August 14, 2002 in response to a Joint Motion by fifteen defendants in six cases brought by Petitioner Phonometrics (A-15 - 36). The district court held that Petitioner Phonometrics was liable under 35 U.S.C. § 285 and Petitioner John P. Sutton, was liable under 28 U.S.C. § 1927, and both were "jointly and severally liable for this award" (A-34). Four of the fifteen defendants had submitted evidence of the amount of the attorney fees sought, but the rest had failed to file "sufficiently clear statements" of costs and fees (A-35). The court ordered further statements. The award was, therefore not a final, appealable award. After further briefing, the district court awarded fees to those four defendants who had previously provided sufficiently clear statements on February 5, 2003 (A-44 - 50). The awards to those defendants who submitted additional statements in support of the Joint Motion, including the five Respondents here, were dated February 10, 2003 (A-58 - 63).

Petitioners filed a Notice of Appeal to the Federal Circuit as of right under Fed. R. App. P. 3 (A-50 - 51).

Because of a clerical mistake in the Notice of Appeal the date of February 10 was omitted, and only the date of February 5, 2003 was recited. Petitioners filed a Motion to

Correct Clerical Mistake as to the Notice of Appeal in the *Hospitality Franchise* case in the Federal Circuit (A-66).

The Federal Circuit granted the motion as to defendant Four Seasons Hotels, Inc. (A-4, footnote), but denied the motion as to Respondents whose final awards were dated February 10, 2003, on the ground that the court lacked jurisdiction to consider those awards to Respondents who were Joint Movants with all defendants in the *Hospitality Franchise* case. (A-5).

Petitioner requested review of the order of a single judge and the same single judge, on behalf of a three-judge panel, dismissed the petition for panel rehearing (A-9 - 10).

Petitioner requested review *en banc* and that was also denied (A-10 – A-12). This Petition followed.

JURISDICTION

This is a patent case brought in the district court under 28 U.S.C. §1338(a). Federal Circuit jurisdiction was under 28 U.S.C. §1295(a)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution (1791):

"No Person shall . . . be deprived of . . . property, without due process of law. . .

2. Federal Rule of Appellate Procedure 3:

"(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.

* * *

(c) Content of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as . . . "all defendants except x" . . . .

(B) designate the judgment, order, or part thereof being appealed, and

(C) name the court to which the appeal is taken.

3. Federal Rule of Civil Procedure 60(a):

"**(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is

pending may be so corrected with leave of the appellate court."

STATEMENT OF THE CASE

This is a petition to review a decision by the Court of Appeals for the Federal Circuit deciding that it did not have jurisdiction to grant leave to correct a clerical mistake. The district court clerk in noting the appeal from a decision of the district court, made a mistake in limiting the appeal to one of the seven defendants in the *Hospitality Franchise* case, rather than an appeal of the entire case. The *Hospitality Franchise* case, C-97-8125-CIV-Ryskamp in the Southern District of Florida, has been before the Federal Circuit four times. The Federal Circuit has lost its patience with Phonometrics and its counsel and has decided to punish counsel with sanctions without the right of appeal. Respondent RHI Hotels, Inc. has deprived Petitioner Sutton of his real and personal property without due process of law.

The case was filed in the Northern District of California in 1996. In 1997, it was transferred to the Southern District of Florida by the Judicial Panel on Multidistrict Litigation for pretrial proceedings. The Florida court concluded that all of Petitioner's complaints were flawed and, *sua sponte* dismissed all of the complaints, including the complaint in this case, under Fed. R. Civ. P. 12(b)(6). The decision dismissing this case was appealed to the Federal Circuit and reversed, because the complaint stated a cause of action for patent infringement. Under federal practice, it is not necessary to plead the specific facts that the district court found were lacking in the complaint. That was the first appeal of this case.

Before the first appeal was decided, the district court judge invited all of the then 29 defendants in the case and the

dozen or so in other cases filed by Petitioner to seek an award of attorney fees against Petitioner. Many defendants filed motions for awards of attorney fees and the district court granted all of the motions, even though the fee-shifting statute relied upon, 35 U.S.C. §285, is limited to "exceptional cases." All of the cases were exceptional in the mind of the district judge who dismissed all of them *sua sponte*. The second appeal in this case was from the award of attorney fees. Because the Federal Circuit held that notice pleading was sufficient to overcome a Rule 12(b)(6) dismissal in the first appeal, it vacated the awards of attorney fees in all of the cases, including the *Hospitality Franchise* case.

The third appeal to the Federal Circuit was from the grant of a motion for summary judgment by the district court. Even though there were genuine issues of fact regarding whether the defendants infringed, and there was a jury demand, the district court decided the fact issue of infringement. Infringement "is a question of fact, to be submitted to a jury." *Winans v. Denmead*, 15 How. 330, 338 (1854); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). The Federal Circuit affirmed the district court's decision on the facts because it routinely ignores the Seventh Amendment requirement that juries decide fact questions (*see,* Petition for Writ of Certiorari 03-856).

The fourth appeal to the Federal Circuit was from an award of attorney fees, including the same attorney fees that were vacated in the second appeal. The district court decided not only that all of Petitioner's cases are exceptional and awards can be made payable by Petitioner, but also that counsel can be made liable "jointly and severally" for an award of all of the attorney fees incurred under 28 U.S.C. §1927 (A-29). It is this appeal that is the subject of this Petition.

All four of the appeals (as well as all of the dozens of appeals in Phonometrics cases) were precisely in the same form specified in Fed. R. App. P. 3(c): [caption of the case]; PLEASE TAKE NOTICE that Phonometrics, Inc. [and, in this latest appeal JOHN P. SUTTON] appeal to the United States Court of Appeals for the Federal Circuit (not the Eleventh Circuit) from [title of judgment or order appealed] dated [appropriate date]. The filing fee of $105.00 is enclosed herewith. [date] [signature]. JOHN P. SUTTON (CA SBN 36560) [address and party represented]. (See Appendix, A-50 - 51, the Notice of Appeal in this case.)

On March 5, 2003, in a timely manner, Notices of Appeal in this form were filed in the Southern District of Florida in the *Hospitality Franchise* case, in the *Holiday Inns* case and in the *Intercontinental Hotels* case. Each one of them had the name (of the parties taking the appeal (Appellate Rule 3(c)(1)(A)), a designation of the order appealed "AWARD OF ATTORNEY FEES" (A-50 - 51) under Rule 3(c)(1)(B), and the name of the court to which the appeal is taken (Rule 3(c)(1)(C). Thus, all requirements for a notice of appeal as of right were present (A-50 - 51). Each of the Notices had a check attached. The three checks dated March 3, 2003, are shown at A-80. The checks in the *Holiday Inns* and *Intercontinental* cases bore the name of the single defendant in those two cases. However, in the *Hospitality Franchise* case, where there were eight defendants remaining in the case, the check listed the case number instead of all of the defendants.

The clerk in the district court became confused by the three checks. If one check was for "Holiday Inns," and one check was for "Intercontinental Hotels," then there should be eight checks for the eight defendants in the *Hospitality Franchise* case, according to the clerk's reasoning. The clerk

arbitrarily chose to designate the last named defendant "Interstate Hotels" as the appellee in the *Hospitality Franchise* appeal, leaving the remaining defendants as merely unappealed "Defendants."

In the three prior appeals of the *Hospitality Franchise* case, the Notice of Appeal was for Case No. 97-8125, just as it was in this appeal, and a single check was sufficient to note the appeals in the three preceding matters. It is some evidence that the appeal was as to all of the defendants, rather than just one or two, because the check and the notice of appeal were for Case No. 97-8125, rather than for fewer of the defendants in that case.

It was a simple and an understandable clerical mistake for the district court clerk to assume that if there were two separate checks for the two other appeals filed March 5, 2003, then there should be eight checks for the eight defendants in the *Hospitality Franchise* appeal. It was, nevertheless, a mistake, because the order in the *case* is appealed, not each individual defendant's award.

Petitioners did not notice the mistake when it received the Official Caption from the Federal Circuit (A-75 - 76). All parties were listed, and the difference between Interstate Hotels being an "Appellee-Defendant" and the other *Hospitality Franchise* defendants being listed as "Defendants" was not apparent to Petitioners. Petitioners only discovered the mistake when RHI Hotels, one of the *Hospitality Franchise* defendants, registered a foreign judgment in the Northern District of California in order to seize the assets of attorney Sutton. RHI Hotels prepared and filed a Certification of Judgment for Registration in Another District (A-56) stating that "no notice of appeal from this Award of Attorneys' Fees has been filed." That representation to the clerk in the Southern District of Florida

was knowingly false, because RHI Hotels had been served with the Notice of Appeal (A-50 - 55) on March 3, 2003. The Certification was filed in the Southern District of Florida with the intent to defraud the court into believing that no notice of appeal had been filed when in fact it had been timely filed.

The clerk in Florida signed the certification prepared by RHI Hotels, and it was filed in the California court. The California judgment was then sent to "Continental Services Incorporated, a member of the "California Commercial Collection Ass'n" to execute on the judgment (A-74). The collection agency has pursued Sutton relentlessly since April, 2003, first by telephone, when the agency was advised that the case was appealed, then by letter, then by seizing the bank account of Petitioner Sutton by the San Francisco Sheriff (A-85), then by recording a lien on the Sutton real property in San Francisco County, San Mateo and Nevada County, California (A-83 - 84), then by subjecting Sutton to a Debtor's Examination for several days, all with full acknowledge that the *Hospitality Franchise* case was appealed a fourth time in exactly the same manner that it had been appealed in the three prior appeals.

Petitioners filed a Motion to Correct Clerical Mistake in the Federal Circuit on May 24, 2003, because the *Hospitality Franchise* case was on appeal, and Rule 60(a) states that "leave of the appellate court" is required to correct a mistake while an appeal is pending. On August 14, 2003, a single Federal Circuit Judge, Circuit Judge Prost, denied the motion to correct the clerical mistake and denied the motion to stay enforcement of the attorney fee awards (A-1). Although the decision purports to deny the motion to correct the clerical mistake, the court in fact ***granted*** the motion as to Four Seasons Hotels, Inc., as shown in the footnote on

A-4. Thus, a clerical mistake was made by the district court and the Federal Circuit acknowledged that the clerk had made a mistake, but it refused to remedy the mistake in its entirety because the awards of attorney fees in granting the Joint Motion for the awards happened to be issued on both February 5 (for Interstate and Four Seasons) and February 10 for the rest.

There had been a Joint Motion for summary judgment that was granted and a Joint Motion for an award of attorney fees that was granted (A-15 - 36). However, the attorney fee award was interlocutory because no specific amounts were awarded. The district court requested all of the Joint Movants to submit time records supporting a request for a specific amount from each one (A-35 - 36). Even though the awards were granted in response to a Joint Motion, the actual awards were not contained in a single order, but in orders issued on February 5 and 10, 2003. The Defendants who had "already filed sufficiently clear statements" were excused from further submissions (A-35 - 36), and their awards were granted on February 5, 2003. As to the rest who had not submitted sufficiently clear evidence, those awards were dated February 10. All of them were granted in the 2002 Order: "Specifically, each Defendant is granted reasonable attorneys' fees and costs incurred" (A-29).

The district court had Case No. 97-8125 for each one of the *Hospitality Franchise* defendants, indicating that there was no intent by the district court to sever any defendant from the Joint Motion. The Order specifically states: "John P. Sutton and Phonometrics, Inc. are jointly and severally liable for this award" (A-34). It does not separate out awards to any of the 18 defendants listed (A-33 - 34) in the Joint Motion. At no time did any of the defendants ask to be severed from the Joint Motion for awards of attorney fees.

The Federal Circuit stated that it did not enter the appeal as to those defendants who were granted awards of February 10 "because Phonometrics had not identified the attorney fees awarded on February 10" (A-4). The court said that failure to specifically identify the awards dated February 10 "is a jurisdictional defect" (*id.*). "[S]uch a 'mistake' cannot be corrected and was not 'clerical'" (*id.*), even though the mistake by the district court clerk of not entering the appeal as to Four Seasons was in fact "clerical" and was a mistake (*id.*).

The motivation for deciding that the defect was jurisdictional was merely to punish Phonometrics for troubling the Federal Circuit with so many appeals: "defendants should have known that all of the attorney fees awards were being appealed because they received copies of the notices of appeal, and . . . Phonometrics always appeals everything in these cases" (*id.*). Judge Prost held that "this court has jurisdiction to review only the February 5, 2003 awards" (*id.*). In other words, the mistake as to Four Seasons, which was not included in the district court's notation of the appeal, would be corrected because that award happened to be dated February 5, 2003, but the other defendants in Case No. 97-8125 would not be corrected because the Federal Circuit lacked jurisdiction to correct the mistake made by the district court. Rule 60(a) gives jurisdiction to district courts to correct mistakes in judgments or orders containing clerical mistakes. It also gives appellate courts jurisdiction to grant leave to district courts to correct clerical mistakes. All that Petitioners requested was leave, under Rule 60(a), to have the district court correct its mistake in limiting the appeal in Case No. 97-8125 to Interstate Hotels. The appellate court, in the first instance, decided the scope of the mistake and how it should be corrected.

Federal Rule of Appellate Procedure 27(c) provides for court review of the action of a single judge, so Petitioners sought review by the court. Three judges reviewed the single judge decision and decided not to reconsider it (A-8 - 10). Phonometrics petitioned for rehearing en banc, and that petition was denied (A-11 - 13).

1. THE MERITS OF THE APPEAL

The Notice of Appeal was intended to raise the issue of whether the term "to the caller" is in claim 1 (A-81 - 82) as the district court and the Federal Circuit have held (*Phonometrics Inc. v. Northern Telecom Inc.*, 133 F.3d 1459, 1465 (Fed. Cir. 1998). The patent claim (A-75 - 76) uses the term "calling telephone" five times to indicate the context of the invention. As noted in footnote 1 of *Intellicall, Inc. v. Phonometrics, Inc.*, 952 Fed. 2d 1384 (Fed. Cir. 1992), the district court stated that the display of the claim was "to the caller." The Federal Circuit said that it was not clear that the district court was restricting the claim because such a restriction was not necessary in view of the fact that the accused devices had a display "to the caller." If the district court intended to rewrite the claim from a display at the "calling telephone" to be "to the caller," it was harmless error. This is an unmistakable acknowledgment that the claim does not recite "to the caller," as a matter of fact.

As noted in the related Petition for Writ of Certiorari in *Phonometrics v. Hyatt Corp. et al.*, Supreme Court no. 03-856, the Federal Circuit cannot distinguish fact from law. It repeatedly seeks to decide cases rather than review decisions by fact-finders. When the issue of "to the caller" arose in the next Phonometrics case to reach the Federal Circuit in 1998, *Phonometrics, Inc. v. Northern Telecom, Inc.*, 133 F.3d 1459 (Fed. Cir. 1998), the court did not hesitate to read the claim as requiring a display to "the caller" (133 F.2d at 1465), just

as the district court did in *Intellicall*. There is no institutional continuity in the Federal Circuit, so the later panel simply ignored the fact that the words "to the caller" are not in the claim. It said that whatever the earlier panel said in *Intellicall* about "to the caller" was "merely dictum" (133 F. 2d at 1464), not a fact, and could be ignored.

It is a fact that a "calling telephone," an apparatus, is not a "caller," a person. The Federal Circuit ignores the facts, and concludes, as a matter of law, that the claimed display must be "to the caller," notwithstanding that it is not the truth and it is contrary to the earlier panel statement in *Intellicall*.

Petitioner Sutton has repeatedly appealed hotel cases on the ground that "to the caller" is not in the patent claim, just as the little boy observed in Hans Christian Andersen's tale "The Emperor's New Clothes." The Federal Circuit has decided to punish the messenger who delivers this unwanted message over and over again. In *Phonometrics, Inc. v. Choice Hotels International, Inc.*, 21 Fed. Appx. 910 (Fed. Cir. 2001), the court said that "further appeals seeking to re-litigate the meaning of that phrase [during the call]" would be subject to sanctions under Rule 38. Although the phrase in *Choice* was "during the call," instead of "to the caller," the phrase here in issue, the Federal Circuit has decided that it does not want to hear any more appeals from Petitioner Sutton on Petitioner Phonometrics cases, no matter what the issue is.

2. THE SANCTIONS

The sanction threatened in *Choice* was imposed in *Phonometrics, Inc. v. Westin Hotels Co.*, 319 F.3d 1328 (Fed. Cir. 2003) and in *Phonometrics, Inc. v. Economy Inns of America et al*, 349 F.3d 1356 (Fed. Cir. 2003). The

sanction in *Westin* was under Fed. R. App P. 38, while the sanction in *Economy Inns* was under Fed. R. Civ. P. 11. Even though the standards differ in the two rules, the Federal Circuit has decided simply to punish Petitioner Sutton without regard to any standards or any facts. (The *Economy Inns* Rule 11 award is the subject of a Petition for Writ of Certiorari in progress.)

After the *Westin* case was argued, the Federal Circuit decided to make it clear to Petitioner Sutton that it never wanted to hear from him again in a Phonometrics matter. The court instructed the Clerk of the court to warn Sutton to never appear again in a Phonometrics case. The present Clerk asked his predecessor Clerk, George Hutchinson, now retired from the court and acting as executive director of the Federal Circuit Bar Association, to specifically warn Sutton of the court's concern over Sutton's advocacy before the court. Hutchinson asked the President of the Federal Circuit Bar Association to personally warn Sutton that the court was concerned about Sutton's advocacy in oral argument. The President, who practices in Washington, D.C., traveled to San Francisco to personally deliver the warning to Sutton that the court was concerned about Sutton's oral advocacy before the Federal Circuit.

The Bar Association President visited Sutton at his home to deliver the message from the Federal Circuit. He did not know what the court was concerned about, and could only say that he was asked to express the court's "concern." When asked what behavior of Sutton was of concern to the court, the President said he did not know. He was not told what caused the concern, and was asked to personally tell Sutton that the court was "concerned."

Shaken, but also baffled, Sutton asked the President who had asked him to visit Sutton. the reply was George

Hutchinson. Until 1962, Hutchinson had worked in this Court for many years. In 1962, he became Clerk of the Court of Customs and Patent Appeals (CCPA). When the CCPA was merged into the Federal Circuit in 1982, Hutchinson became Clerk of the merged court. Also in 1962, Petitioner Sutton began as Technical Advisor to Associate Judge J. Lindsay Almond, Jr. of the CCPA. Because Sutton had known Hutchinson for over forty years, he asked him what behavior of Sutton so concerned the court.

Hutchinson replied that he did not know what concerned the court either. The present Clerk had simply told him to warn Sutton that something had happened at an oral argument, but Hutchinson was not told what it was. Hutchinson told Sutton that he assumed it was something about Sutton's health during the argument that concerned the court. Sutton tried to avoid further oral arguments by settling as many of the Phonometrics cases as he could. Cases against eight of the defendants were settled, but there were fully briefed cases against more than a dozen defendants pending before the Federal Circuit awaiting oral argument. Three cases, involving multiple defendants were argued on September 2, 2003 and the present case was raised by a motion under Rule 60(a) against eight defendants.

In all of these cases, the wrath of the court was visited upon Sutton. *Phonometrics v. Economy Inns*, *supra*, held that it was a violation of Rule 11 to advocate a theory that the Federal Circuit was wrong in holding that "to the caller" is in the patent claim. The present case involved a holding that Sutton's conduct in defending against motions for summary judgment and motions for awards of attorney fees was a violation of 28 U.S.C. § 1927.

Here, Sutton filed an appeal of the *Hospitality Franchise* case, but the Federal Circuit held, *en banc*, that the appeal was not effective as against Respondents that were included in the Notice of Appeal, because the date of the orders relating to these Respondents was incorrectly recited.

REASONS FOR GRANTING THE WRIT

The Federal Circuit denied the appeal as of right under Fed. R. App. P. 3(a)(1) by holding that it lacked jurisdiction to review the awards to Respondents. Respondent RHI Hotels, Inc. has garnished the bank account of Petitioner Sutton (A-85) and placed liens on three real property assets of Petitioner Sutton (A-83 - 84), depriving him of property without due process of law (Fifth Amendment, U.S. Constitution).

The Federal Circuit abused its discretion in holding, en banc (A-10 - 12), that it lacked jurisdiction to grant leave to correct a clerical mistake under Fed. R. App. P. 60(a). The Federal Circuit recognized that the district court had made a mistake in not noting the appeal as to the Four Seasons defendant, but it failed to recognize the mistake in not noting the appeal as to the Respondents, who are *Hospitality Franchise* defendants that had jointly moved for awards of attorney fees.

The Federal Circuit erred in concluding the Petitioner intended to appeal the award of $60,000 in attorney fees to Interstate Hotels (A-47) but not to appeal the award of $124,000 in attorney fees to RHI Hotels (A-61), when Interstate Hotels and RHI hotels were both defendants in the *Hospitality Franchise* case.

The Federal Circuit erred in holding that a Notice of Appeal of the award of attorney fees in the *Hospitality Franchise* case, served on all defendants, was not a notice of appeal as to some of the defendants.

The Federal Circuit erred in holding that the omission of "February 10" in the Notice of Appeal was "jurisdictional" and was not a mistake that was correctable to give the court jurisdiction to hear the appeal.

ARGUMENT

3. CORRECTING THE MISTAKE ALLOWS THE RECORD TO SPEAK THE TRUTH

The first question presented is whether the Fifth Amendment bars federal courts from depriving Petitioner Sutton of property without due process of law. The district court awarded attorney fees against Petitioners jointly and severally. The Federal Circuit has held that it lacks jurisdiction to grant leave to correct a clerical mistake. Respondent RHI Hotels has garnished Petitioner Sutton's bank account (A-85) and has encumbered three parcels of real property and improvements belonging to Petitioner Sutton. This taking is a deprivation of property without due process of law. This Court has declared that the prohibition against a deprivation of property "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power." (*Slaughter-House Cases*, 16 Wall. 36 (1873).

The garnishment and liens are "a diminution in value of the property" and refusal to allow the appeal was "the direct and immediate cause." *United States v. Causby*, 328 U.S. 256, 267 (1946). There is no doubt that "a servitude

has been imposed on the land" in violation of the Fifth Amendment (*id.*).

"Even if no execution sale had yet occurred, the lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the stricture of due process." *Peralta v. Heights Medical Center Inc.*, 488 U.S. 80, 85 (1988). The liens were recorded as a direct result of the Federal Circuit decision that it had no jurisdiction to consider the *Hospitality Franchise* appeal of Respondents' awards.

Petitioners have been denied their appeal as of right under Appellate Rule 3.

In addition, Federal Civil Rule 60(a) covers the clerical omission of "and 10" between February 5" and "2003." in the Notice of Appeal. Wright, Miller & Kane, *Federal Practice and Procedure*, §2851 states that Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must by brought to an end and that justice should be done." Because the Federal Circuit has corrected the mistake as to *Four Seasons*, pursuant to the Rule 60 Motion, it recognizes the obligation to see justice done. It also recognizes that the litigation of the *Hospitality Franchise* case cannot be brought to an end by denying the motion, since the litigation proceeds as to at least two of the defendants as well as with the consolidated cases against *Holiday Inns* and *Intercontinental Hotels*. Accordingly, doing justice as to the other Joint Movants in the *Hospitality Franchise* case should proceed within the purpose of Rule 60.

At §1854, the Wright Treatise states that a "motion under Rule 60(a) can only be used to make the judgment or

record speak the truth and cannot be used to make it say something other than what originally was pronounced." Here, what was originally was pronounced was that Phonometrics filed a Notice of Appeal of the Awards of Attorney Fees in a timely manner in the *Hospitality Franchise* case, naming all of the defendants in the case. If some of the Respondent defendants were to be excluded from the appeal, Appellate Rule 3(c)(1)(A) requires a term such as "all defendants except x" to be in the Notice of Appeal if the defendants were appealing. Rule 3 does *not* require specification of the parties other than those "taking the appeal." Thus, there is no need to name the appellees in a Notice of Appeal other than in the caption of the case. The mistake that was made was that some of the awards were dated February 5, 2003, as were the awards in the *Holiday Inns* and *Intercontinental Hotels* cases, while others of the *Hospitality Franchise* awards were dated February 10, 2003. Adding February 10 to the awards of attorney fees will provide "that the record can actually speak the truth." (*Mathies v. Railroad Retirement Board*, 341 F.2d 243, 248 (8th Cir. 1965)).

For the record to speak the truth, the record should be changed to include both dates for awards in the appealed *Hospitality Franchise* case. "The mistake correctable under the rule [60(a)] need not be committed by the clerk or the court; the rule may be utilized to correct mistakes by the parties as well." (Wright et al at §2854). "The term 'clerical mistake' does not mean that it must be made by a clerk. The phrase merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others. It is the type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an

attorney" (*id.*). The mistake as to omission of February 10 in the Notice of Appeal is one "traditionally or customarily handled by clerks" and is "apparent on the record and which does not involve a legal decision or judgment of an attorney."

The error in a date is a matter correctable under Rule 60(a). (*U.S. v. Roth*, 164 F.2d 575 (2nd Cir. 1948)).

4. CORRECTING THE MISTAKE SHOWS THE INTENT TO APPEAL

The second question presented is whether Petitioner Phonometrics intended to appeal case no. 97-8125 or did it intend to sever one or two defendants from the case for a more limited appeal. For the Federal Circuit to be correct that omission of "February 10" was "jurisdictional," there would have to be some evidence that a "legal decision or judgment of an attorney" was made. There is no such evidence. On the contrary, the record shows that Petitioner Sutton and his new assistant did not notice that some attorney fee awards were dated February 5 and others were dated February 10 (A-77 – 78). This is not a "legal decision or judgment." There can be no doubt that the district court intended to grant the awards of attorney fees to all of the *Hospitality Franchise* defendants that jointly moved for the awards (A-33 - 34). The district court made no decision to sever the awards to *Interstate Hotels* and *Four Seasons* from the rest of the joint moving parties. Neither the district court nor Petitioner Sutton treated the *Hospitality Franchise* defendants differently, depending on the dates of the awards.

On the contrary, the Sutton Declarations (A-66; A-77 - 79) explain what happened. The court clerk assumed that a payment of a fee was required for each defendant, not for each case that was appealed. That mistake had nothing to do

with the dates of February 5 or 10. The Federal Circuit acknowledged that the district court clerk made a mistake in not noting the appeal of the *Hospitality Franchise* case as to Four Seasons (A-4).

Petitioner Sutton believed that the Notice of Appeal was of the *Hospitality Franchise* case and prepared an Index of the Joint Appendix that related to all of the defendants (A-70 - 73). If Sutton had intended to sever two defendants for a limited appeal, there would have had to be some motion or recitation of the limitation of the appeal. There is absolutely nothing in the record to indicate that Sutton made a legal decision *not* to appeal the awards to Joint Movants that were dated February 10. There can be no doubt that Sutton "intended one thing but by merely clerical mistake or oversight did another" (*Dura-Wood Treating Co. v. Century Forest Industries*, 694 F.2d 112, 114 (5th Cir. 1982)). "To be correctable under Rule 60(a), the 'mistake must not be one of judgment or even of misidentification, but merely a recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature.'" (*In re Galiardi*, 745 F.2d 335 (5th Cir. 1984), quoting *Dura-Wood, supra*). The "amanuensis" here was a new assistant on the job for only a few days, who did not examine the dates on each one of the ten awards entered in three cases to make sure the dates were all February 5 (A-77 –78).

"Without seeking to refine the matter unduly, it seems to us that Rule 60(a) is concerned primarily with mistakes which do not really attack the party's right to the judgment at the time it was entered. It permits the correction of irregularities which becloud, but do not impugn it. To that end, 60(a) permits, inter alia, reasonable additions to the record" (*U.S. v. Stuart*, 392 F.2d 60, 62 (3rd Cir. 1968). Adding "and 10" between "February 5" and "2003" is a

reasonable addition to the record that does not impugn the judgment.

The judgment in favor of Defendant Interstate Hotels was for about $60,000 (A-47)). The judgment in favor of RHI Hotels was for about $124,000 (A-61). Petitioners did not intend to appeal the smaller judgment but not the one twice as large in the *Hospitality Franchise* case.

The only reason for holding that omission of February 10 was a *jurisdictional* defect was that the Federal Circuit seeks to punish Attorney Sutton for continuing to appeal Phonometrics even after he had been warned by the court repeatedly that it would regard *any* appeal to be frivolous. Frivolity is defined as anything done by Petitioners, no matter what the merits might be. This Court must enforce the mandate of Fed. R. Civ. P. 1: that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." The Federal Circuit knew that RHI Hotels had garnished Sutton's bank account and had filed liens for $124,000 against his real property in California, and wanted that punishment to succeed to chill the advocacy of Sutton. It is not just; it is not speedy; it is not inexpensive to endure collection efforts over many months where the foreign judgment against Sutton was obtained by a willful false representation to the clerk of the Florida court that no appeal had been filed.

The injustice should be corrected. Leave to correct the mistake should have been granted. Certiorari should be granted to permit the Notice of Appeal to recite both the February 5 and 10 awards of attorney fees because no legal judgment was made to exclude any *Hospitality Franchise* defendants from the judgment or from the appeal.

The Federal Circuit has not acted equitably and has not acted discreetly. It has acted capriciously and arbitrarily. "Judicial discretion, as we understand it, is impartial reasoning guided and controlled in its exercise by fixed legal principles, requiring the court, in consideration of the facts and circumstances, to decide as its reason and conscience dictate; it requires the court to be discreet, just, circumspect and impartial, and that it exercise cautious judgment. the term connotes the opposite of caprice and arbitrary action." *Dixie Cup Co. v. Paper Container Mfg. Co.*, 174 F.2 834, 836 (7th Cir. 1949).

5. ALL *HOSPITALITY FRANCHISE* DEFENDANTS HAD FAIR NOTICE OF THE APPEAL

The Notice of Appeal (A-45) was served on counsel for all of the *Hospitality Franchise* defendants (A-49 - 50). The Notice had the case name, listing all defendants, the court to whom the appeal was made, the subject matter of award of attorneys' fees, and the date of the awards as to two of the defendants. By clerical mistake, the date of the awards as to the remaining defendants in the *Hospitality Franchise* case was omitted (February 10). All defendants in the case had filed a Joint Motion for summary judgment and Joint Motion for an award of attorney fees, both of which were granted (A-15; A-17). The awards as to the amount for each defendant bore the dates of February 5 and February 10. Three cases were appealed the same day, and the notice of appeal in each one recited the correct date of February 5 and had a check for each case (A-80). It was a clerical omission to not put "and" "10" between "February 5" and "2003."

The defendants in *Hospitality Franchise* had fair notice that Petitioner had appealed the case to the Federal Circuit even though some of the attorney fee awards bore a

date of February 10 instead of February 5. The Notice was not defective, it was perfected. The clerical mistake did not defeat the notice to defendants.

6. RULE 60(a) ALLOWS AN APPELLATE COURT TO GRANT LEAVE TO CORRECT A CLERICAL MISTAKE

The fourth question presented relates to jurisdiction of the Federal Circuit. The holding by the full court below that it lacked jurisdiction to either correct a clerical mistaken or remand to the district court to correct the mistake is bizarre. Rule 60(a) states that "[d]uring the pendency of an appeal, such mistakes may be corrected . . . while the appeal is pending with leave of the appellate court.

The appellate court has jurisdiction, as well as discretion, to grant leave to correct a mistake. It is an exercise of jurisdiction to hold that "such a 'mistake' cannot be correction and was not 'clerical'" (A-4 - 5).

The Federal Circuit has long held extremely narrow views of its jurisdiction patent cases. Here, it cited *Minnesota Mining and Mfg. Co. v. Chemque, Inc.* 303 F.3d 1294, 1309) (Fed. Cir. 2002) (A-4) for the proposition that it lacked jurisdiction to review a district court's decision.

In *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83 (1993), the Federal Circuit held that it lacked jurisdiction to consider a declaratory judgment claim. This court vacated that judgment and remanded. "[T]he issue before us, therefore, concerns the jurisdiction of an intermediate appellate court" which did in fact have jurisdiction.

The same result should occur here. The Federal Circuit has jurisdiction to correct the mistake, and did so in adding Four Seasons as an appellee in the *Hospitality Franchise* appeal (A-4, footnote). If the court had jurisdiction to correct the mistake of the district court clerk as to Four Seasons, it certainly had jurisdiction to correct the mistake as to the other *Hospitality Franchise* defendants.

Lack of jurisdiction is a slender reed to support a personal attack on Petitioner Sutton by RHI Hotels in seeking $124,000 personally from Sutton (A-61). Extrajudicial threats via the Federal Circuit Bar Association and refusal to grant leave to correct a clerical mistake are inappropriate actions solely to chill the advocacy of a member of the bar of the Federal Circuit since the day it was created. Such tactics for the improper purpose of shutting up Petitioner Sutton should not be condoned. The judgment should be vacated and the case remanded for correcting the clerical mistake.

CONCLUSION

For all of these reasons, a writ of certiorari should issue to correct the errors.

Dated: March 3, 2004

Respectfully submitted,

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Attorney for Petitioner
PHONOMETRICS, INC.

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-1290, -1291, -1292

PHONOMETRICS, INC.

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendant-Appellee,

and

FOUR SEASONS HOTELS, INC.,

Defendant-Appellee,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC),

Defendants-Appellees,

and

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., GROSVENOR HOTELS GROUP, FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS
INTERNATIONAL, and RHI HOTELS, INC.,

Defendants.

ON MOTION

Before PROST, Circuit Judge.

ORDER

Phonometrics, Inc. and John P. Sutton (Phonometrics) move to correct a "clerical mistake." Benchmark Hospitality, Inc., Grosvenor Hotels Groups, Fairmont Hotel Management Company, Cendant Corporation, RHI Hotels, Inc., and Park Lane Hotels International (Defendants) oppose. Benchmark also moves for fees and costs incurred in preparing its response to Phonometrics motion. Phonometrics moves for an extension of time to file its reply and submits its reply by that extended due date. Phonometrics also submits a "second supplemental declaration."

In this case, the district court entered awards of attorneys fees against Phonometrics and for the Defendants and Defendants-Appellees. The awards against the Defendants were entered on February 10, 2003. The awards against the Defendants-Appellees were entered on February

5, 2003. Phonometrics filed notices of appeal seeking review of the "AWARD OF ATTORNEYS' FEES dated February 5, 2003." This court docketed and consolidated the appeals. We designated as Defendants-Appellees those parties who were awarded attorney fees on February 5. Because Phonometrics had not identified the attorney fees awarded on February 10, we designated the parties that received awards on February 10 only as Defendants.*

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* We agree with Phonometrics that Four Seasons Hotels, Inc. should be listed as a defendant-appellee. The award of attorney fees regarding Four Seasons was entered on February 5. The above caption reflects that change and also deletes parties that either did not seek attorney fees or that settled with Phonometrics.

Phonometrics seeks to correct a "clerical mistake" to reflect that his appeals include the awards of attorney fees granted to the parties that received awards on February 10. However, such a "mistake" cannot be corrected and was not

"clerical." The failure to correctly designate what is appealed is a jurisdictional defect. See, e.g., Minnesota Mining and Manufacturing Co. v. Chemque, Inc., 303 F.3d 1294, 1309 (Fed. Cir. 2002) (lack of jurisdiction to review district court's invalidity determinations due to failure to mention invalidity determinations in notice of appeal). Phonometrics argues that the defendants should have known that all of the attorney fees awards were being appealed because they received copies of the notices of appeal, and that there is no harm to them because they should know that Phonometrics always appeals everything in these cases. However, Fed. R. App. P. 3 clearly requires that the notice of appeal "must . . . designate the judgment, order, or part thereof being appealed . . . ." Thus, because Phonometrics' identified the February 5, 2003 attorney fees awards in its notices of appeal and failed to identify the February 10, 2003 attorney fees awards, this court has jurisdiction to review only the February 5, 2003 awards.

Finally, within its motion to correct a clerical mistake, Phonometrics requests that we stay the enforcement of the attorney fees awards pending appeal. First, as just noted, we have no jurisdiction over the February 10, 2003 attorney fees awards. Second, Phonometrics has not complied with Fed. R. App. P. 8(a) or Standard Havens Prods., Inc. v. Gencor Industries, Inc., 897 F.2d 511 (Fed. Cir. 1990) to obtain a stay.

Accordingly,

IT IS ORDERED THAT:

(1) Phonometrics' motion to correct a clerical mistake is denied. The revised official caption is reflected above.

(2) Phonometrics' motion for an extension of time to file its reply is granted.

(3) Benchmark's motion for fees and costs is denied.

(4) Phonometrics' motion to stay enforcement of the attorney fee awards is denied.

Aug 14 2003
Date

Sharon Prost
Circuit Judge

cc: John P. Sutton, Esq.
Nathan Lane, III, Esq.
Jonathan R. Bass, Esq.
Amy S. Rubin, Esq.
Stanley Young, Esq.
Kristin Ring, Esq.
Lawrence Lambert, Esq.
William E. Davis, Esq.
Howard A. Slavitt, Esq.
Stephen D. Kaus, Esq.

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APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-1290, -1291, -1292

PHONOMETRICS, INC.

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendant-Appellee,

and

FOUR SEASONS HOTELS, INC.,

Defendant-Appellee,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC),

Defendants-Appellees,

and

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., GROSVENOR HOTELS GROUP, FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, and RHI HOTELS, INC.,

Defendants.

ON MOTION

Before MAYER, Chief Judge, CLEVENGER and PROST, Circuit Judges.

PROST, Circuit Judge.

ORDER

Phonometrics, Inc. and John P. Sutton (Phonometrics) petition for panel rehearing of this court's September 3, 2003 order that granted three judge review of a previous single-judge order but denied reconsideration of the previous order.* Phonometrics and Sutton also move to leave to supplement their petition, with supplement attached.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The motion for leave to supplement the petition is granted.

FOR THE COURT

Sep 26, 2003
Date

Sharon Prost
Circuit Judge

cc: John P. Sutton, Esq.
Nathan Lane, III, Esq.
Jonathan R. Bass, Esq.
Amy S. Rubin, Esq.
Stanley Young, Esq.
Kristin Ring, Esq.
Lawrence Lambert, Esq.
William E. Davis, Esq.
Howard A. Slavitt, Esq.
Stephen D. Kaus, Esq.

s8

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* Phonometrics and Sutton filed a combined petition for panel rehearing and rehearing en banc. The petition for rehearing en banc will be circulated.

APPENDIX C

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-1290, -1291, -1292

PHONOMETRICS, INC.,

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendants-Appellees,

and

FOUR SEASONS HOTELS, INC.,

Defendant-Appellee,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC),

Defendant-Appellee,

and

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., GROSVENOR HOTELS GROUP, FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, and RHI HOTELS, INC.,

Defendants.

ON COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MAYER, Chief Judge, NEWMAN, MICHEL, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, LINN, DYK, and PROST, Circuit Judges.[1]

ORDER

[1] Circuit Judge Gajarsa did not participate in the vote.

Phonometrics, Inc. ("Phonometrics") filed a combined petition for panel rehearing and rehearing en banc of the motions panel order issued on September 3, 2003. The court invited a response, and a joint response was filed by

RHI Hotels, Inc., Fairmont Hotel Management Company, Grosvenor Hotels Group, Benchmark Hospitality, Inc., and Cendant Corporation (collectively "Defendants"). Phonometrics moved for leave to file a reply to the Defendants' joint response.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Phonometrics petition for panel rehearing is denied.

(2) Phonometrics petition for rehearing en banc is denied.

(3) Phonometrics motion for leave to file the reply is denied.

FOR THE COURT

Nov 14, 2003
Date

Jan Horbaly
Clerk

cc: John P. Sutton, Esq.
Kristin A. Ring, Esq.
Nathan Lane, III, Esq.
Jonathan R. Bass, Esq.

Amy S. Rubin, Esq.
Lawrence Lambert, Esq.
William E. Davis, Esq.
Gary L. Benton, Esq.
Howard A. Slavitt, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

-vs.-

MARRIOTT INTER-NATIONAL, INC., and HOST MARRIOTT CORP.	No. 94-6533-CIV-RYSKAMP
HOLIDAY INNS, INC.	No. 94-6689-CIV-RYSKAMP
INTER-CONTINENTAL HOTELS CORP.	No. 94-6691-CIV-RYSKAMP
WYNDHAM HOTEL CO.	No. 94-7106-CIV-RYSKAMP
MEDITRUST CORP., f/k/a LA QUINTA INNS, INC.	No. 94-7127-CIV-RYSKAMP
HOSPITALITY FRAN-CHISE SYSTEMS, INC. a/k/a CENDANT CORP., BENCHMARK HOSPITAL-ITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR	No. 97-8125-CIV-RYSKAMP

HOTELS GROUP, FOUR SEASONS HOTELS, INC., CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, and INTERSTATE HOTELS CORP.

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT VERIFIED MOTION FOR ATTORNEYS' FEES AND COSTS

THIS CAUSE is before the Court upon Defendants' Inter-Continental Hotels Corp., Holiday Inns, Inc., Clubhouse Inns of America, Xanterra Parks & Resorts L.L.C. f/k/a AMFAC Resorts, LLC, Four Seasons Hotels, Inc., Grosvenor Hotel Group, Fairmont Hotel Management Co., Park Lane Hotels, Int'l, RHI, Inc. f/k/a Colony Hotels & Resorts, Interstate Hotels LLC (as successor to Interstate Hotels Corp.), Cendant Corp, f/k/a Hospitality Franchise Systems, Inc., Wyndham Int'l, Inc. (successor to Wyndham Hotel Co.), Meditrust Co. f/k/a La Quinta Inns, Inc., Marriott Int'l, Inc., Host Marriott Corp., Benchmark Hospitality, Inc.,

and Inns of America (erroneously named herein as Economy Inns of America) (collectively "Defendants") Joint Verified Motion for Attorneys' Fees and Costs, filed June 11, 2002. Defendants' joint motion is now ripe for adjudication.

I. BACKGROUND

This motion arises out of Plaintiff's claims of patent infringement against Defendants. In 1994, Plaintiff filed complaints against Defendants, alleging that Defendants infringed upon Plaintiff's U.S. Patent No. 3,769,463 ("the '463 patent"), by using internal telephone equipment to calculate, display and record the cost of long distance telephone calls originating within its hotels. The complaints charged that Defendants' infringement was willful.

On April 12, 2002, this Court granted the Defendants' Joint Motion for Summary Judgment and entered a final judgment in favor of each Defendant and against Plaintiff. In granting summary judgment, this Court found no dispute of material fact with respect to the. question of whether

Defendants' hotels' telephone systems provide callers with a real-time digital display in which the caller can track the cost of the call in dollars and cents while the call is in progress. This Court pointed out that the Federal Circuit has construed the `463 patent as requiring that the device provide "the caller with real time, accurate information about the costs of the call via digital display as the long distance charges accrue during the call." Phonometrics, Inc. v. Northern Telecom, Inc., 133 F.3d 1459, 1465 (Fed. Cir. 1998). The Court stated that Plaintiff does not even accuse any Defendant of having such a system as it is defined by the Federal Circuit.

On June 11, 2002, Defendants filed their Joint Verified Motion for Attorneys' Fees and Costs. In their motion, Defendants seek (1) fees and costs as sanctions pursuant to 28 U.S.C. § 1927, 35 U.S.C. § 285, and Section 57.105, Florida Statutes, (2) prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure. and 28

U.S.C. § 1920, and (3) pre-judgment interest. Defendants argue that neither Plaintiff nor Plaintiffs counsel had any reasonable basis to assert and maintain patent infringement claims against Defendants after the Northern Telecom decision and that the maintenance of these lawsuits after January 15, 1998 resulted in unreasonable and vexatious multiplication of the proceedings in this case.

On June 28, 2002, Plaintiff filed its Response. In its Response, Plaintiff argues that Defendants' joint motion is procedurally barred due to errors in signatures, certifications, and contact information and because the motion is untimely. Plaintiff also argues that Defendants are not the prevailing parties and that Section 57.105, Florida Statues has no application in this case. Plaintiff does not address whether or not it unreasonably and vexatiously multiplied the proceedings in these cases.

This Court has determined that a hearing on this matter would not be helpful. Plaintiff has had ample

opportunity to respond and be heard with regard to this motion as well as other motions for sanctions and attorneys' fees that have been and are currently pending before this Court in related Phonometrics patent infringement actions. This motion, therefore, is now ripe for adjudication.

II. DISCUSSION

As a preliminary matter, this Court notes that Defendants' joint motion for attorneys' fees and costs is not procedurally barred. Plaintiff argues that Defendants failed to provide proper signatures, certifications, and contact information. However, upon review of the joint motion, this Court fails to find any serious errors. Any error of signature, certification, or contact is so slight that it fails to produce any confusion or result in Plaintiff being unable to properly respond to the joint motion. Furthermore, most errors have been corrected by Defendants and no longer exist. Plaintiff also argues that the joint motion is untimely. However, Defendants filed a motion for an extension of time by which

to file motions for fees and costs, and this Court granted the extension. The joint motion was filed within the time period provided by the extension. Without finding serious procedural errors that hamper the ability of Plaintiff to respond to the merits of the motion, this Court fails to bar the joint motion. This joint motion may therefore be adjudicated.

In their joint motion, Defendants make three requests: (1) for attorneys' fees and costs incurred after January 15, 1998 as sanctions against Plaintiff and Plaintiff's counsel; (2) for prevailing party costs; and (3) for pre judgment interest. The Court addresses each request in turn.

1. Attorneys' Fees and Costs as Sanctions

In their joint motion, Defendants assert that Plaintiff did not have a reasonable basis to maintain these lawsuits after the Federal Circuit issued its opinion in Northern Telecom. Defendants assert that after Northern Telecom, Plaintiff knew its patent infringement claims against Defendant were factually and legally baseless. Defendants

argue that Plaintiffs maintenance of this lawsuit after Northern Telecom was therefore vexatious and unjustified and deserving of an award of attorneys' fees and costs pursuant to 28 U.S.C. § 1927, 35 U.S.C. § 285 and Section 57.105, Florida Statutes. This Court agrees in part and finds the maintenance of this lawsuit after January 15, 1998 to be vexatious, unjustified and undertaken in bad faith and grants attorneys' fees and costs accordingly.

Under the patent laws, "[t]he court in exceptional cases may award reasonable attorneys' fees to the prevailing party." 35 U.S.C. § 285. Generally, an award of fees in a patent case must be the exception and not the rule. See Milgo Elec. Corp. v. United Business Commun. Inc., 623 F.2d 645, 667 (10th Cir. 1980), cert. denied, 449 U.S. 1066 (1980). The types of conduct which may form a basis for finding a case exceptional include: "`willful infringement, inequitable conduct before the P.T.O. [Patent and Trademark Office], misconduct during litigation, vexatious or unjustified

litigation, and frivolous suits.'" Amsted Indus. Inc. v. Buckeye Steel Castings Co., 23 F.3d 374, 376 (Fed. Cir. 1994).

When a party makes "a colorable, albeit weak, argument that was not raised. in bad faith," the court should not grant attorneys' fees. TVI Energy Corms. v. Blaine, 806 F.2d 1057, 1061 (Fed. Cir. 1986). Conversely, when a claim is "clearly hopeless and unquestionably without any possible basis in fact or law," the court has discretion to award attorneys' fees and costs. Chemical Engineering Corp. v. Marlo. Inc., 754 F.2d 331, 335 (Fed. Cir. 1984). Furthermore, "the filing and maintaining of an infringement suit which the patentee knows, or on reasonable investigation should know, is baseless constitutes grounds for declaring a case exceptional under 35 U.S.C. § 285." Eltech Sys. v. PPG Indus., 710 F. Supp. 622 (W.D. La. 1988), affd, 903 F.2d 805, 811 (Fed. Cir. 1990) (stating "where as here, the patentee is manifestly unreasonable in assessing

infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence").

In addition to assessing attorneys' fees and costs against a party in exceptional cases, a court may assess attorneys' fees and costs against the party's attorney in certain circumstances. Title 28 U.S.C. § 1927 provides: "[a]ny attorney... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." To sustain an award against an attorney, the court must find bad faith, see Avirgan v. Hull, 932 F2d 1572, 1582 (11th Cir. 1991), yet "the lack of an explicit finding of bad faith by the trial judge will not preclude sanctions when the record supports such a finding." Baldwin Hardware Corn. v. Frankse Enter. Corp., 78 F.3d 550, 561 (Fed. Cir. 1996).

On February 13, 1997, Plaintiff specifically represented in a hearing before this Court that "the fact of the matter is that there are none of these equipments that these defendants [including each Defendant in this joint motion] have that has a display to the caller during the call in progress." Transcript of February 13, 1997 Hearing before Judge Kenneth Ryskamp. This representation alone signifies that Plaintiff was aware from the moment of filing that Defendants' hotels' telephone systems did not provide callers with a real-time digital display which tracks the costs of along distance call while the call is in progress.

During this Court's February 13, 1997 hearing, Plaintiff argued that the `463 patent does not require a display to the caller during the call, and pointed out that the Federal Circuit had never stated that the '463 patent requires such a display. At that point in time, Plaintiff's argument was not completely baseless because there was no precedent from the Federal Circuit specifically requiring such display to the

caller during the call to find infringement of the `463 patent. As the Federal Circuit explained in Northern Telecom, Intellicall Inc. v. Phonometrics Inc., 952 F.3d 1384 (Fed. Cir. 1992), only decided the issue of "whether the limitation digital display' meant only visual display or also encompassed machine readable information." Northern Telecom, 133 F.3d at 1464. The Federal Circuit specifically stated that "[a]ny construction of other limitation in claim 1... made in Intellicall was merely dictum, and therefore has no preclusive effect for this appeal." Id.

Any doubt regarding the requirements of the `463 patent and its claim construction was cleared up in 1998 when the Federal Circuit went into great detail evaluating the scope of the '463 patent in its opinion in Northern Telecom. Specifically, the Federal Circuit restated its previous holding from Intellicall, 952 F.3d at 1387-88, that the patent's required "digital display" does not include machine readable devices that merely save call information on a computer for

later access. Northern Telecom, 133 F.3d at 1464. The Federal Circuit also held: 1) "substantially instantaneous display of cumulative call cost in dollars and cents" means "functions to display current, accurate information about the costs of a call" that is displayed for costs "as they accrue, in real time, and not only once the call has ended;" 2) the patent requires that "the costs displayed in the register must be accurate at all times during the call, so that regardless of the point at which the call is terminated, the cumulative cost displayed in the register will be accurate, without further calculation;" and 3) any real-time information provided by the equipment must be provided to "the caller." Id. at 1464-65. In sum, the Federal Circuit found that the following is required for Plaintiff to maintain a patent infringement suit with respect to the '463 Patent: "[A] devise which displays the cumulative costs of a long distance call both as charges accrue and after the call has been terminated." Id. at 1466.

From the moment the Federal Circuit issued its opinion in Northern Telecom, Plaintiff was on notice that the Federal Circuit's interpretation of the `463 patent requires a real-time visual display which tracks the cost of a long distance call while the call is in progress. Plaintiff, however, never once accused Defendants of violating the `463 patent as it was defined by the Federal Circuit. Instead, Plaintiff attempted to slide around the Federal Court's interpretation of the `463 patent by arguing that Defendants infringed the `463 patent because Defendants' hotels had substantially instantaneous access to the cost of guest calls through their computer monitors and printers.

Before Northern Telecom, there was confusion surrounding the claim interpretation announced in Intellicall. At the moment Northern Telecom was announced, however, it became clear that infringement of the `463 patent could only be possible if Defendants' hotels provided real-time visual displays showing the costs of the call to the caller

during the call. From this point on, the litigation of these cases no longer remained within the normal bounds. Because Plaintiff continued to litigate these cases knowing that its claims could not meet the standard for infringement of the '463 patent articulated by the Federal Circuit, an inference of bad faith is appropriate. Plaintiff's continued maintenance of these cases after Northern Telecom resulted in unjustified multiplication of proceedings. The unjustified, vexatious and bad faith maintenance of these lawsuits is deserving of an award of fees and costs pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285. Accordingly, this Court grants Defendant attorneys' fees and costs incurred after January 15, 1998, the date, that the Federal Circuit issued its opinion in Northern Telecom. Plaintiff is responsible for these fees and costs pursuant to 35 U.S.C. § 285. Plaintiff's counsel is responsible for these fees and costs pursuant to 28 U.S.C. § 1927.

Defendants request that attorneys' fees and costs be levied against Plaintiff pursuant to Section 57.105, Florida Statutes. Such request, however, is inappropriate as Section 57.105, Florida Statutes does not apply to these patent infringement cases. As has been articulated clearly in case law, "when a cause of action is federal... [courts] ordinarily do not look to state law in considering whether to award attorneys' fees." In re Sheridan, 105 F.3d 1164, 1167 (7th Cir. 1997) (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975) (stating that state law can govern attorneys' fees in diversity cases); F.D. Rich Co. v. U.S., 417 U.S. 116, 127 (1974) (stating that for a federal cause of action, the remedy is based on federal, not state, law)). Although the Eleventh Circuit has endorsed awarding attorneys' fees pursuant to Section 57.105, Florida Statutes, such endorsements have been with state causes of action. See Bank Atlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1478 n.11 (11th Cir. 1992). Since the

Phonometrics cases are claims for patent infringement, a federal cause of action, this Court does not apply Section 57.105, Florida Statutes in determining whether to apply attorneys' fees and costs. Defendants' request for fees and costs pursuant to Section 57.105, Florida Statutes is therefore denied.

2. Prevailing Party Costs

In addition to awarding fees and costs pursuant to pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285, this Court awards prevailing party costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that "costs other than attorneys' fees shall be allowed as of course to the prevailing party." The taxable costs recoverable by a prevailing litigant under Rule 54(d) are specifically enumerated in 28 U.S.C. § 1920. Defendants are prevailing parties in these actions because they have obtained final judgments in their favor. See Fireman's Fund

Ins. Co. v. Tropical Shipping & Constr. Co. Ltd., 254 F.3d 987, 1012 (11th Cir. 2001). As prevailing parties, Defendants are entitled to costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920.

3. Pre-judgment Interest

This Court declines to grant any pre-judgment interest. Defendants request pre judgment interest; however, Defendants fail to clearly identify the legal basis for their request. It appears that the basis for the request is premised at least in part on Section 57.105, Florida Statutes. As discussed above, Section 57.105, Florida Statutes does not apply to these cases. Any request for pre-judgment interest based upon Section 57.105, Florida Statutes is therefore denied. Beyond Section 57.105, Florida Statutes, this Court is unable to ascertain upon what, if anything, the request for pre-judgment interest is based. Defendants do not cite to any case law or statute, except for Section 57.105, Florida Statutes, to support their request for pre judgment interest. It

appears that Defendants merely assume that they are entitled to pre judgment interest if they are granted fees and costs. Such assumption has no foundation. Without a legal basis for granting pre-judgment interest, this Court declines to grant any pre-judgment interest.

IV. CONCLUSION

For the reasons stated above, and after review of the motion and the pertinent portions of the record, it is hereby

ORDERED AND ADJUDGED that Defendants' Inter-Continental Hotels Corp., Holiday Inns, Inc., Clubhouse Inns of America, Xanterra Parks & Resorts L.L.C. f/k/a AMFAC Resorts, LLC, Four Seasons Hotels, Inc., Grosvenor Hotel Group, Fairmont Hotel Management Co., Park Lane Hotels, Int'l, RHI, Inc. f/k/a Colony Hotels & Resorts, Interstate Hotels LLC (as successor to Interstate Hotels Corp.), Cendant Corp. f/k/a Hospitality Franchise Systems, Inc., Wyndham Int'l, Inc. (successor to Wynham Hotel Co.), Meditrust Co. f/k/a La Quinta Inns, Inc., Marriott

Int'l, Inc., Host Marriott Corp., Benchmark Hospitality, Inc., and Inns of America (erroneously named herein as Economy Inns of America) Joint Verified Motion for Attorneys' Fees and Costs, filed June 11, 2002, is **GRANTED IN PART AND DENIED IN PART** as explained herein. Specifically, each Defendant is granted reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. These fees and costs are awarded against the Plaintiff, pursuant to 35 U.S.C. § 285, and against the Plaintiff's counsel, Mr. John P. Sutton, pursuant to 28 U.S.C. § 1927. John P. Sutton and Phonometrics, Inc. are jointly and severally liable for this award. Each Defendant is also awarded prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. Defendants are not awarded pre-judgment interest.

IT IS FURTHER ORDERED that within ten (10) days of the date of this Order, each Defendant (except for Four Seasons Hotels Limited, Interstate Hotels, LLC, Holiday Inns, Inc. and Inter-Continental Hotels Corp. who have already filed sufficiently clear statements) is to submit a statement to this Court which clearly indicates the amount of prevailing party costs and the amount of attorneys' fees and costs expended since January 15, 1998. In particular, each Defendant shall provide a listing of the prevailing party costs, descriptions of for each type of costs, the total costs incurred after January 15, 1998, descriptions for each type of costs, the total attorneys' fees incurred after January 15, 1998, the total number of hours expended by each attorney working on this case (including local counsel), descriptions for the work done during these hours, and the hourly rates of each attorney working on this case (including local counsel). Prior to submitting their statements, Defendants are urged to review the statements submitted by Four Seasons Hotels

Limited, Interstate Hotels, LLC, Holiday Inns, Inc. and Inter-Continental Hotels Corp. as examples of sufficiently clear statements. Defendants Four Seasons Hotels Limited, Interstate Hotels, *LLC,* Holiday Inns, Inc. and Inter-Continental Hotels Corp, may submit supplemental statements if deemed necessary. Plaintiff may respond to the statements of costs and fees, and each Defendant may reply. Upon review of said statements, the responses, and the replies, this Court will determine the amount of the fees and costs award.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 14th day of August, 2002.

_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
see attached service list

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS, INC.,	No. 94-6533-CIV-RYSKAMP
Plaintiff,	No. 94-6689-CIV-RYSKAMP
v.	No. 94-6691-CIV-RYSKAMP
MARRIOTT INTERNATIONAL, INC., and	No. 94-7106-CIV-RYSKAMP
HOST MARRIOTT CORP.	No. 94-7127-CIV-RYSKAMP
HOLIDAY INNS, INC.	No. 97-8125-CIV-RYSKAMP
INTER-CONTINENTAL HOTELS CORP.	
WYNDHAM HOTEL CO.	
MEDITRUST CORP. f/k/a LA QUINTA INNS, INC.	
HOSPITALITY FRANCHISE SYSTEMS, INC. a/k/a CENDANT CORP.; BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA,	

and INTERSTATE HOTELS CORP.

Defendants.

_____/

AWARD OF ATTORNEYS' FEES

On August 14, 2002 **[DE 159]**, this Court granted in part arms denied in part Defendants' Joint Verified Motion for Attorneys' Fees and Costs The Court granted each Defendant reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. The Court awarded these fees and costs against Plaintiff pursuant to-35 U.S.C. §285 and against Plaintiff's counsel, Mr. John P. Sutton pursuant to 28 U.S.C. § 1927. Plaintiff and Plaintiffs counsel are jointly and severally liable for this award. The Court also ordered that each Defendant is entitled to prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. The Court did not award pre-judgment

interest. Defendants have submitted their statements of fees and costs and Plaintiff has filed his objections to said statements. This matter is now ripe for adjudication.

I. LEGAL STANDARD

A. Attorneys' Fees

In determining an award of attorneys' fees, this Court must begin by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The Court may then consider whether this amount is to be adjusted for extraordinary results. Id. at 1302. Courts are also expected to use their knowledge and experience concerning reasonable and proper fees when making fee determinations. See Norman, 836 F.2d at 1303. The moving party bears the burden of submitting evidence supporting the fee award and "([w]here the documentation of hours is inadequate, the

district court may reduce the award accordingly" Hensley, 411 U.S. at 433. The time records should be detailed enough to enable a court to eliminate excessive, redundant, unnecessary, or otherwise unreasonably expended hours. Id., at 437. The Supreme Court has instructed, however, that the lodestar is presumptively reasonable and should be modified only in exceptional cases. See City of Birmingham v. Dague, 505 U.S. 557, 562 (1992).

B. Costs

28 U.S.C. § 1920 provides that this Court may tax as costs:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

II. DISCUSSION

Park Lane Hotels International was represented by Cooper, White & Cooper LLP.

1. Attorneys' Fees

Park Lane seeks $34,183 in attorneys' fees from January 15,1998. $1,000 of this amount went to McKenna & Cuneo for the preparation of the Joint Summary Judgment Motion, and $400 of this amount went toward the preparation of the motion far attorneys' fees. The Court finds that Park Lane attorneys reasonably spent 109.1 hours defending against Plaintiffs claims. The Court finds that the attached documentation shows that none of the hours documented were excessive, duplicative, or inadequately documented. See Hensley, 461 U.S. at 432-34.

After determining the hours reasonably spent on the litigation, the Court must set a reasonable hourly rate. "A

reasonably hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman. 836 F.2d at 1299. Park Lane's submission indicates that its counsel and their staff provided 109.1 hours of representation at a blended rate of $300.48 per hour for a total of $32,783 in fees. The Court finds that Park Lane also incurred $1,000 in fees for the preparation of the Joint Summary Judgment Motion and $400 in fees for the preparation of the motion for attorneys' fees.

Therefore, the lodestar amount for Park Lane is $34,183. The Court does not find that this amount should be modified.

2. Costs

Park Lane seeks $1,729.39 in costs. The Court finds that Park Lane may recover all of this amount because its submission only-claims costs for transcript and deposition fees, which are covered under 28 US.C. § 1920.

IV. CONCLUSION

The Court, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Plaintiff and his counsel are jointly and severally liable to Defendant Park Lane for attorneys' fees in the amount of $34,183 and costs in the amount of $1,729.39.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 10th day of February, 2003.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
See motion service list

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 97-8125-CIV-RYSKAMP

PHONOMETRICS, INC.,

Plaintiff,

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.

Defendants.
_____/

AWARD OF ATTORNEYS' FEES

On August 14, 2002 **[DE 159]**, this Court granted in part and denied in part Defendants' Joint Verified Motion for Attorneys' Fees and Costs. The Court granted each Defendant reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. The Court awarded these fees and costs against Plaintiff pursuant to 35 U.S.C. § 285 and

against Plaintiff's counsel, Mr. John P. Sutton pursuant to 28 U.S.C. § 1927. Plaintiff and Plaintiffs counsel are jointly and severally liable for this award. The Court also ordered that each Defendant is entitled to prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. The Court did not award pre judgment interest. Defendants have submitted their statements of fees and costs and Plaintiff has filed his objections to said statements. This matter is now ripe for adjudication.

1. LEGAL STANDARD

A. Attorneys Fees

In determining an award of attorneys' fees, this Court must begin by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Norman v. Housing Authority, of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The Court may then consider whether this amount is to be adjusted for

extraordinary results. Id. at 1302. Courts are also expected to use their knowledge and experience concerning reasonable and proper fees when making fee determinations. See Norman, 836 F.2d at 1303. The moving party bears the burden of submitting evidence supporting the fee award and "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 411 U.S. at 433. The time records should be detailed enough to enable a court to eliminate excessive, redundant, unnecessary, or otherwise unreasonably expended hours. Id. at 437. The Supreme Court has instructed, however, that the lodestar is presumptively reasonable and should be modified only in exceptional cases. See City of Birmingham v. Dague, 505 U.S. 557, 562 (1992).

B. Costs

28 U.S.C. § 1920 provides that this Court may tax as costs:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

II. DISCUSSION

Interstate Hotels Corporation and its successor Interstate Hotels, LLC was represented by Nathan Lane III of Graham & James, LLP, which merged with Squire, Sanders & Dempsey, L.L.P. in July 2000.

1. Attorneys' Fees

Interstate seeks $59,011.25 in attorneys' fees from January 15, 1998. The Court finds that Interstate attorneys reasonably spent 177.7 hours defending against Plaintiff's claims. The Court finds that the attached documentation

shows that none of the hours documented were excessive, duplicative, or inadequately documented. See Hensley, 461 U.S. at 432-34.

After determining the hours reasonably spent on the litigation, the Court must set a reasonable hourly rate. "A reasonably hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman, 836 F.2d at 1299. Interstate's submission indicates that its counsel and their staff provided 177.7 hours of representation at a blended rate of $342.60 per hour for a total of $60,881.75 in fees. Interstate has subtracted $642.50 from its fees request for fees incurred in connection with its successful Rule I i motion. Interstate has also subtracted $1,228 in firm discounts from its fees request.

Therefore, the lodestar amount for Interstate is $59,011.25. The Court does not find that this amount should be modified.

Interstate seeks $1,526.84 in court reporter's fees for depositions. This expense is specifically provided for in 2$ U.S.C. § 1920. The Court therefore awards Interstate $1,526.84 in costs.

IV. CONCLUSION

The Court, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Plaintiff and his counsel are jointly and severally liable to Defendant Interstate for attorneys' fees in the amount of $59,011.25 and costs in the amount of $1,526.84.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 5th day of February, 2003.

KENNTH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
See motion service list

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

Case No. 97-8125-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida corporation,

Plaintiff

NOTICE OF APPEAL TO THE FEDERAL CIRCUIT

v.

HOSPITALITY FRANCHISE SYSTEMS, INC., aka CENDANT CORPORATION, BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, OUTRIGGER LODGING SERVICES, and INTERSTATE HOTELS CORPORATION,

Defendants.

_____/

PLEASE TAKE NOTICE that PHONOMETRICS, INC. and JOHN P. SUTTON appeal to the United States Court of Appeals for the Federal Circuit (not the Eleventh Circuit) from the AWARD OF ATTORNEYS' FEES dated February 5, 2003. The filing fee of $105.00 is enclosed herewith.

Dated: 3/3/03

JOHN P. SUTTON (CA SBN 36560)
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Plaintiff-Appellant,
Phonometrics, Inc.
Appearing pursuant to MDL Rule 1.4

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, state:

I am employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within action. I am an employee of JOHN P. SUTTON, Attorney at Law, and my business address is 2421 Pierce Street, San Francisco, California 94115-1131.

On March 4, 2003, I caused the within document, described as follows:

NOTICE OF APPEAL TO THE FEDERAL CIRCUIT

to be served on the parties named below, by placing a true and correct copy in a sealed envelope for collection and mailing on this date, at San Francisco, California, addressed as follows:

SEE ATTACHED LIST

I am readily familiar with this office's practice for collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service

on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2003, at San Francisco, California.

_____

Kurt Lipschutz

J. Bruce McCubbrey/Kristin Ring
Coudert Brothers 600 Beach Street, Third Floor
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Counsel for RHI, Inc.

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Counsel for Fairmont/Grosvenor

Amy S. Rubin/Jon L. Swergold
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Counsel for Park Lane Hotels Intnl.

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Nathan Lane III, Esq.
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San Francisco. CA 94111
Counsel for Interstate Hotels Corp.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

PHONOMETRICS, INC.	) No. 97-8125-
	) CIV-RYSKAMP /
Plaintiff,	) VITUNAC
	)
v.	)
	)
HOSPITALITY FRAN-	)
CHISE SYSTEMS, INC,	)
ET AL. – RHI Hotels, Inc.	)
	)
Defendants.	)

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, Clarence Maddox, Clerk of the United States district court certify that Award of Attorneys' Fees is a true and correct copy of the original Award of Attorneys' Fees entered in this action on February 10, 2003 [DE 382], as it appears in the records of this court, and that no notice of appeal from this Award of Attorneys' Fees has been filed,

and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed.

IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.

Date: May 13, 2003

Clarence Maddox
Clerk, United States District Court for the Southern District of Florida

_____
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS, INC., No. 94-6533-CIV-RYSKAMP

Plaintiff, No. 94-6689-CIV-RYSKAMP

v. No. 94-6691-CIV-RYSKAMP

MARRIOTT INTERNATIONAL, INC., and No. 94-7106-CIV-RYSKAMP
HOST MARRIOTT CORP. No. 94-7127-CIV-RYSKAMP

HOLIDAY INNS, INC. No. 97-8125-CIV-RYSKAMP

INTER-CONTINENTAL HOTELS CORP.

WYNDHAM HOTEL CO.

MEDITRUST CORP. f/k/a LA QUINTA INNS, INC.

HOSPITALITY FRANCHISE SYSTEMS, INC. a/k/a CENDANT CORP.; BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI

HOTELS, INC., INNS OF
AMERICA, and INTERSTATE
HOTELS CORP.

Defendants.
_____/

AWARD OF ATTORNEYS' FEES

On August 14, 2002 **[DE 159]**, this Court granted in part and denied in part Defendants' Joint Verified Motion for Attorneys' Fees and Costs. The Court granted each Defendant reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. The Court awarded these fees and costs against Plaintiff pursuant to 35 U.S.C. § 285 and against Plaintiff"s counsel, Mr. John P. Sutton pursuant to 28 U.S.C. § 1927. Plaintiff and Plaintiff"s counsel are jointly and severally liable for this award. The Court also ordered that each Defendant is entitled to prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and

28 U.S.C. § 1920. The Court did not award pre judgment interest. Defendants have submitted their statements of fees and costs and Plaintiff has filed his objections to said statements. This matter is now ripe for adjudication.

I. LEGAL STANDARD

A. Attorneys' Fees

In determining an award of attorneys' fees, this Court must begin by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The Court may then consider whether this amount is to be adjusted for extraordinary results. Id. at 1302. Courts are also expected to use their knowledge and experience concerning reasonable and proper fees when making fee determinations. See Norman, 836 F.2d at 1303. The moving party bears the burden of submitting evidence supporting the fee award and

"[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 411 U.S. at 433. The time records should be detailed enough to enable a court to eliminate excessive, redundant, unnecessary, or otherwise unreasonably expended hours. Id. at 437. The Supreme Court has instructed, however, that the lodestar is presumptively reasonable and should be modified only in exceptional cases. See City of Birmingham v. Dague, 505 U.S. 557, 562 (1992).

II. DISCUSSION

RHI Hotels, Inc. was represented by Coudert Brothers LLP. RHI seeks $123,307 in attorneys' fees from January 15, 1998 and $1,000 in fees paid to McKenna & Cuneo for the preparation of the Joint Motion for Summary Judgment. The Court finds that RHI attorneys reasonably spent 421.2 hours defending against Plaintiffs claims. The Court finds that the attached documentation shows that none of the hours docu-

mented were excessive, duplicative, or inadequately documented. See Hensley, 461 U.S. at 432-34.

After determining the hours reasonably spent on the litigation, the Court must set a reasonable hourly rate. "A reasonably hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman, 836 F.2d, at 1299. RHI's submission indicates that its counsel and their staff provided 421.2 hours of representation at a blended rate of $292.75 per hour for a total of $123,307 in fees. The Court also finds that RHI may recover the $1,000 for the preparation of the Joint Summary Judgment Motion.

Therefore, the lodestar amount for RHI is $124,307. The Court does not find that this amount should be modified.

IV. CONCLUSION

The Court, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Plaintiff and his counsel are jointly and severally liable to Defendant RHI for attorneys' fees in the amount of $124,307.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 10th day of February, 2003.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
See motion service list

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1290, -1291, -1292

PHONOMETRICS, INC.,

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendants-Appellees,

and

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, and OUTRIGGER LODGING SERVICES,

Defendants,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC,)

Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida in case nos. 94-CV-6689, 94-CV-6691, 97-CV-8125, Judge Kenneth L. Ryskamp

DECLARATION OF JOHN P. SUTTON IN SUPPORT OF MOTION TO CORRECT CLERICAL MISTAKE

JOHN P. SUTTON
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Phonometrics, Inc.

John P. Sutton, under penalty of perjury, declares:

1. I am an attorney at law representing Appellant Phonometrics, Inc. in this case. I make this declaration of my own personal knowledge.

2. I identify Exhibit 1 attached as a true copy of the Notice of Appeal in this case. The notice erroneously had three parties that were no longer Defendants: Clubhouse, AMFAC and Inns of America. All other parties were Appellees. Exhibit 1 shows that the Notice of Appeal was served on RHI and Park Lane, among others.

3. I identify Exhibit 2 attached as a letter I received from Continental Services Incorporated dated May 7, 2003. The letter was in response to my representation that the case was on appeal and that enforcement of a judgment on appeal was improper. The letter purports to state the position of Appellee RHI, Inc. is not an Appellee.

4. The Official Caption of this case indicates that RHI, Inc. is not an Appellee. That appears to be the result of a clerical mistake under Fed. R. Civ. P. 60 (a), either at the district court level or at the Federal Circuit level. The Notice of Appeal (Exhibit 1) shows that RHI is a Defendant Appellee.

5. This motion is made to seek leave to correct the clerical mistake.

6. Exhibit 3 attached is a copy of the Index to Joint Appendix, showing the Orders appealed in this case, the evidence in support, and the docket sheets. All Appellees have been served with this Index under Federal Circuit Rule 30 (b)(2).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23RD day of May, 2003 at San Francisco, California.

JOHN P. SUTTON

Exhibit 3

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1290, -1291, -1292

PHONOMETRICS, INC.,

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendants-Appellees,

and

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, and OUTRIGGER LODGING SERVICES,

Defendants,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC,)

Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida in case nos. 94-CV-6689, 94-CV-6691, 97-CV-8125, Judge Kenneth L. Ryskamp

JOINT APPENDIX

JOHN P. SUTTON
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Phonometrics, Inc.

INDEX TO JOINT APPENDIX

		Page(s)
1.	Order Granting in Part and Denying in Part Defendants' Joint Verified Motion for Attorneys' Fees and Costs, signed by Judge Kenneth L. Ryskamp, United States District Judge, filed August 14, 2002	A-1 to A-13
2.	Award of Attorneys' Fees to Inter-Continental, filed February 5, 2003	A-14 to A-19
3.	Award of Attorneys' Fees to Interstate Hotels Corporation and its successor Interstate Hotels, LLC, filed February 5, 2003	A-20 to A-23
4.	Award of Attorneys' Fees to Four Seasons Limited, filed February 5, 2003	A-24 to A-28
5.	Award of Attorneys' Fees to Fairmont Hotel Management Company and Grosvenor Hotels Group, filed February 10, 2003	A-29 to A-35
6.	Award of Attorneys' Fees to Cendant Corporation, filed February 10, 2003	A-36 to A-40
7.	Award of Attorneys' Fees to RHI Hotels, Inc., filed February 10, 2003	A-41 to A-44
8.	Award of Attorneys' Fees to Park Lane Hotels International, filed February 10, 2003	A-45 to A-49

9. Award of Attorneys' Fees to Benchmark Hospitality Inc., filed February 10, 2003 A-50 to A-54

10. Docket Sheet, Case No. 94-CV-6689 A-55 to A-71

11. Docket Sheet, Case No. 94-CV-6691 A-72 to A-86

12. Docket Sheet, Case No. 97-CV-8125 A-87 to A-127

13. Affidavit of Howard Slavitt in Support of Attorneys Fees and Costs Incurred, on behalf of Defendants Fairmont Hotel Management Company and Grosvenor Hotel Group, dated May 28, 2002 A-128 to A-133

14. Affidavit of Gary L. Benton in Support of Motion for Attorneys' Fees and Costs, on behalf of Defendant RHI, Inc., dated June 6, 2002 A-228 to A-311

15. Affidavit of Thomas F. Smegal, Jr., Esq. in Support of Defendants' Joint Motion for Attorney Fees on Behalf of RHI Hotels, Inc., dated June 11, 2002 A-312 to A-315

16. Affidavit of Amy Rubin, Esq., in Support of Motion for Attorneys' Fees and Costs, on behalf of Defendants Inter-Continental Hotels Corporation and Holiday Inns, Inc., dated June 7, 2002 A-330 to A-374

17. Declaration of Stanley Young of Attorneys' Fees and Costs Incurred, on behalf of Defendant Four Seasons Hotels Limited, dated June 7, 2002 A-380 to A-390

18. Affidavit of Nathan Lane III in Support of Motion for Attorneys' Fees and Costs, on behalf of Defendant Interstate Hotels Corporation, dated June 7, 2002 A-400 to A-405

19. Affidavit of Stephen B. Gillman, Esq., on behalf of Defendants Holiday Inns, Inc. and Intercontinental, dated June 10, 2002 A-406 to A-408

20. Affidavit of Evelyn Wiggins, Esq. in Support of Defendant Benchmark Hospitality, Inc.'s Request for Attorneys' Fees and Costs, dated June 10, 2002 A-409 to A-410

21. Affidavit of Barry R. Davidson , Esq. in Support of Motion for Attorneys' Fees and Costs, on behalf of Defendants Inter-Continental Hotels Corporation, dated June 11, 2002 A-411 to A-415

22. Affidavit of G. Hopkins Guy, II, Esq. of Orrick, Herrington & Sutcliffe LLP, in Support of Defendant Hospitality Franchise Systems, Inc. N/K/A Cendant Corporation's Request for Attorneys' Fees and Costs in Connection with Defendants' Joint Verified Motion For Attorneys' Fees and Costs, dated June 14, 2002 A-406 to A-412

23. Affidavit of David E. Bergquist, Esq. in Support of Motion For Attorneys' Fees and Costs, on behalf of Defendant

Benchmark Hospitality Inc., dated August 23, 2002 A-420 to A-426

24. Affidavit of Stephen Kaus Re: Attorneys' Fees and Costs as Specified in Court Order Dated August 14, 2002, on behalf of Defendant Park Lane Hotels International, dated August 26, 2002 A-430 to A-435

25. Supplemental Affidavit of Howard Slavitt Clarifying Attorneys' Fees and Costs Incurred by Defendants Fairmont Hotel Management and Grosvenor Hotels Group since January 15, 1998, dated August 26, 2002 A-440 to A-466

26. Affidavit of William E. Davis. Esq. of Buchanan Ingersoll, P.C. In Support of Defendant Hospitality Franchise Systems, Inc. n/k/a Cendant Corporation's Updated Request for Attorneys Fees and Costs in Connection with Defendants' Joint Verified Motion for Attorneys' Fees and Costs, dated August 27, 2002 A-470 to A-478

27. Affidavit of Kristin Ring Re: RHI Hotels, Inc.'s Supplemental Submission in Support of Motion for Attorneys' Fees and Costs, dated August 27, 2002 A-480 to A-489

28. Supplemental Declaration of Stanley Young Regarding Attorneys' Fees and Costs Incurred, on behalf of Defendant Four Seasons Hotels Limited, dated August 27, 2002 A-490 to A-492

Exhibit 2

CSI Continental Services Incorporated

P O Box 130284
Carlsbad CA 92013-0284
760.929.0900 / 929.0904 fax
www.csicollect.com

May 7, 2003 415/922-2885

John P Sutton
2421 Pierce St
San Francisco CA 94115-1131

RE: Radisson Hotels International Inc (RHI)
Balance: $124307.00 US Dollars
Acct #:
CSI #: 03026335

We advised RHI of your statement of the appeal being filed. They responded saying that they have no record of an appeal being filed on their award of attorney's fees. They said there may have been appeals filed on the others, but not theirs. The award was dated February 10, 2003.

Please advise.

Sincerely,

DEHill

Dan E Hill
CSI
888-437-4274 TOLL FREE
888-297-3880 Fax

2207

BEST AVAILABLE COPY

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1290, -1291, -1292

PHONOMETRICS, INC.,

Plaintiff-Appellant,

and

JOHN P. SUTTON,

Sanctioned Party-Appellant,

v.

HOLIDAY INNS, INC. and INTER-CONTINENTAL HOTELS CORP.,

Defendant-Appellee,

and

FOUR SEASONS HOTELS, INC.

Defendant-Appellee,

and

INTERSTATE HOTELS CORPORATION (also known as Interstate Hotels, LLC),

Defendant-Appellee,

HOSPITALITY FRANCHISE SYSTEMS, INC. (also known as Cendant Corporation), BENCHMARK HOSPITALITY, INC., GROSVENOR HOTELS GROUP, FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, and RHI HOTELS, INC.,

Defendants,

Appeals from the United States District Court for the Southern District of Florida in case nos. 94-CV-6689, 94-CV-6691, 94-CV-8125, Judge Kenneth L. Ryskamp

DECLARATION OF JOHN P. SUTTON IN SUPPORT OF MOTION FOR REVIEW OF ORDER BY SINGLE JUDGE

JOHN P. SUTTON, ESQ.
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Phonometrics, Inc.

1. I am an attorney at law representing Phonometrics in the above litigation. I make this declaration of my own personal knowledge.

2. I identify Exhibit 1 attached as a true copy of the Order on Motion to Correct Clerical Mistake, dated August 14, 2003.

3. I identify Exhibit 2 attached as a true copy of the original Official Caption of this case.

4. I identify Exhibit 3 attached as a true copy of the Official Caption as Revised August 14, 2003.

5. I identify Exhibit 4 attached as a true copy of three of my checks sent to the district court to pay for appeals in the Holiday Inns case (check 1334), the Intercontinental case (check 1335) and the Hospitality Franchise case (check 1337). All of them are dated March 3, 2003. These were sent with the notice of appeal to the district court in a timely manner. My assistant who had worked on these cases for the last seven years departed on

February 11, 2003. His replacement had been on the job only a few days when he prepared the Notice of Appeal and served it on all Defendants. A notice of Appeal in all three cases was filed the same day based on orders dated February 5, 2003. Neither I nor my assistant noted that some of the orders were dated February 10 and some were dated February 5. It was a clerical mistake not to list both dates in the Hospitality Franchise Notice of Appeal.

6. I identify Exhibit 5 as a true copy of the basic order granting awards to all of the Defendants based on their Joint Motion. This order was not appealable because it did not have an amount of the award. Only orders having a specific amount are final, even though the joint motion was granted in August 2002.

7. I identify Exhibit 6 as a true copy of the first page of the Benchmark award attached to the Opposition filed by Lawrence Lambert. It mistakenly indicates that Benchmark is in the Marriott case.

8. I identify Exhibit 7 as a true copy of the first page of the Park Lane award attached to the Opposition filed by Stephen Kaus. It mistakenly indicates that Park Lane is in the Marriott case.

9. I identify Exhibit 8 as a true copy of the first page of the Fairmont and Grosvenor awards attached to the Opposition filed by Howard Slavitt. It mistakenly indicates that Fairmont and Grosvenor are in the Marriott case. The Marriott case settled in 2002, and Marriott and other settling Defendants waived any award of attorney fees under the terms of the agreement.

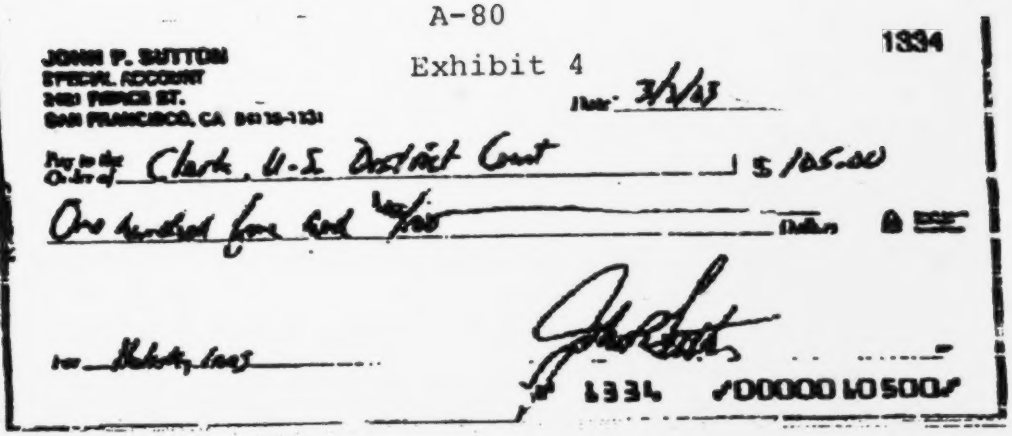
10. I identify Exhibit 9 as a true copy of the first page of the RHI award attached to the Opposition filed by Kristen Ring.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of August, 2003 at San Francisco, California.

_____

JOHN P. SUTTON

Exhibit 4


JOHN P. SUTTON
SPECIAL ACCOUNT
3401 PIERCE ST.
SAN FRANCISCO, CA 94118-1131

1334

Date 3/3/83

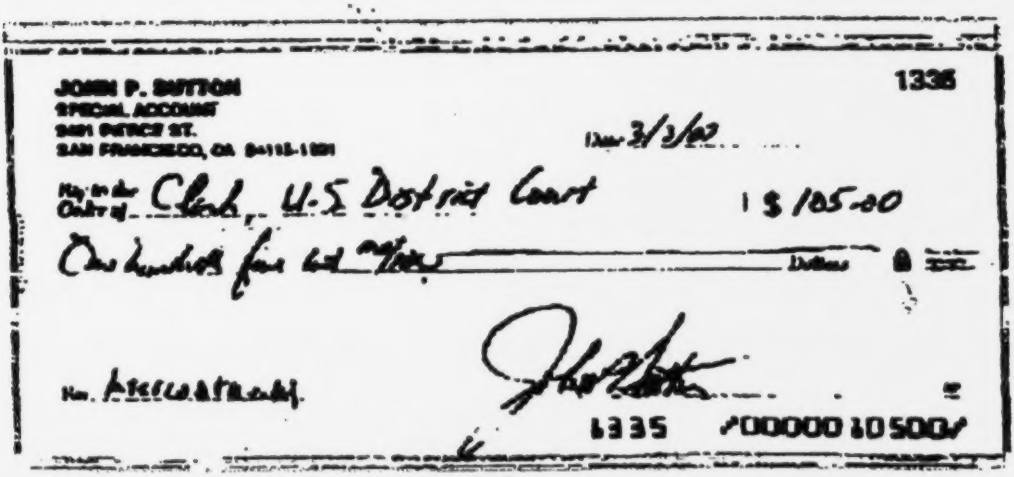
Pay to the Order of Clerk, U.S. District Court $ 105.00

One hundred five and 00/100 Dollars

For Motion, Fees

1334 #00000 10500#

Check: 1334 Amount:105.00


JOHN P. SUTTON
SPECIAL ACCOUNT
3401 PIERCE ST.
SAN FRANCISCO, CA 94118-1131

1335

Date 3/3/83

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One hundred five and 00/100 Dollars

For Motion & Fees

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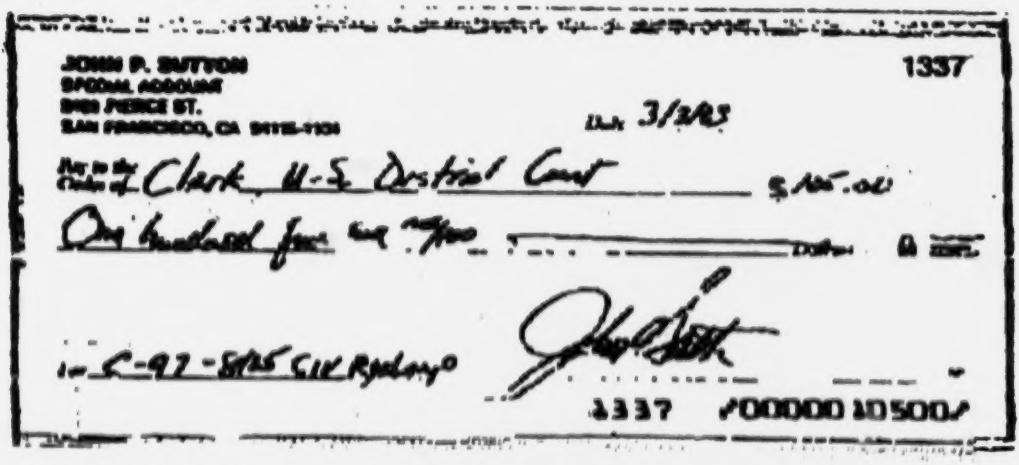

JOHN P. SUTTON
SPECIAL ACCOUNT
3401 PIERCE ST.
SAN FRANCISCO, CA 94118-1131

1337

Date 3/3/83

Pay to the Order of Clerk, U.S. District Court $ 105.00

One hundred five and 00/100 Dollars

For C-82-5825 CW Reopen

1337 #00000 10500#

Check: 1337 Amount:105.00

APPENDIX K

United States Patent 3,769,463
Graham et al. Oct. 30, 1973

***

We claim:

1. An electronic solid state long-distance telephone call cost computer apparatus for computing and recording the cost of each long-distance telephone call initiated from a given calling telephone, actuated by the lifting and replacement of the calling telephone to operate switch means coupled to the calling telephone, and further actuated by a call-completion signal generated in the telephone system when a called party answers at a called telephone, the computer apparatus comprising:
call timing means for timing the duration of each completed call;
settable charge selector means for storing initial fixed charge data for a given predetermined initial call interval and incremental charge data for subsequent additional predetermined incremental call intervals;
call cost register means, including a digital display, for providing a substantially instantaneous display of cumulative call cost in dollars and cents;
and computer circuit means, coupled to said switch, to said timing means, to said charge selector means, and to said call cost register means, for automatically recording, in the call cost register means, the cost of each long-distance call made from the calling telephone, said computer circuit means comprising:
reset means for resetting said timing means and said

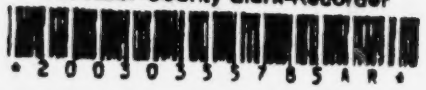
call cost register means immediately upon occurrence of said call-completion signal;
initial cost transfer means initiating operation of said call timing means and for applying the complete initial fixed charge data from said charge selector means to said call cost register means substantially instantaneously upon resetting of said call timing means and said call cost register;
incremental cost transfer means for applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out the initial call interval by said call timing means and for again applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out of each incremental call interval following said initial call interval;
and termination means for interrupting operation of said computer apparatus, with the cumulative call cost held in and displayed by said call cost register means, upon operation of said switch by replacement of the calling telephone.

RECORDING REQUESTED BY

WHEN RECORDED MAIL TO

NAME Jacqueline N. Anker
MAILING ADDRESS 27 W. Anapamu St. #325
CITY, STATE ZIP CODE Santa Barbara, CA 93101

2003-355785
02:51pm 12/30/03 AJ Fee: 13.00
Count of pages 2
Recorded in Official Records
County of San Mateo
Warren Slocum
Assessor-County Clerk-Recorder



SPACE

A-83

APPENDIX L

TITLE(S)

Abstract of Judgment

RHI Hotels et al. v. John P. Sutton et al.

H509716

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): TELEPHONE NO:	FOR RECORDER'S USE ONLY
☐ Recording requested by and return to: Law Offices of Jacqueline N. Anker 27 W. Anapamu St. #325 Santa Barbara, CA 93101 (805)962-1024 ☒ ATTORNEY FOR ☒ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD	
NAME OF COURT: U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA MAILING ADDRESS: 450 Golden Gate Ave. CITY AND ZIP CODE: San Francisco, CA 94102 PHONE NUMBER:	
PLAINTIFF: Phonometrics et al. DEFENDANT: RHI Hotels Inc. et al.	CASE NUMBER: PJ03 027 MJJ

ABSTRACT OF JUDGMENT

1. The ☒ judgment creditor ☐ assignee of record applied for an abstract of judgment and represents the following:

a. Judgment debtor's
Name and last known address

John P. Sutton
2421 Pierce St.
San Francisco, CA 94115

b. Driver's license no. & state: _____ ☒ Unknown

c. Social Security no.: 270-32-5137 ☐ Unknown

d. Summons or notice of entry of sister-state judgment was personally served or mailed to (name and address): not applicable

e. ☐ Additional judgment debtors are shown on reverse.

Date: 6-18-2003

.....Jacqueline N. Anker.....
(TYPE OR PRINT NAME)

_____
(SIGNATURE OF APPLICANT OR ATTORNEY)

2. a. ☒ I certify that the following is a true and correct abstract of the judgment entered in this action.

b. ☐ A certified copy of the judgment is attached.

3. Judgment creditor (name):
RHI Hotels Inc.,
whose address appears on this form above the court's name.

4. Judgment debtor (full name as it appears in judgment):
John P. Sutton

5. a. Judgment entered on (date:) 5-15-2003
b. Renewal entered on (date:)
c. Renewal entered on (date:)

6. Total amount of judgment as entered or last renewed:
$ 124,307.00

7. ☐ An ☐ execution ☐ attachment lien is endorsed on the judgment as follows:
a. Amount: $
b. In favor of (name and address):

8. A stay of enforcement has
a. ☒ has not been ordered by the court
b. ☐ been ordered by the court effective until (date):

9. ☐ This judgment is an installment judgment.

RICHARD W. WIEKING
Clerk, by _____, Deputy
Date Issued 6/24/03

ABSTRACT OF JUDGMENT

A-84

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): TELEPHONE NO.:

Law Offices of Jack Shane N. Anker
127 West Anapamu Street, #325 (805) 962-1024
Santa Barbara, CA 93101

ATTORNEY FOR (Name):

FOR RECORDER'S USE ONLY

NAME OF COURT: UNITED STATES DISTRICT COURT
450 GOLDEN GATE AVE.
SAN FRANCISCO, CA 94102

PLAINTIFF: Phenomenics, et al

DEFENDANT: RHI Hotels, et al

LEVYING OFFICER (Name and Address):
San Francisco Sheriff Civil Section
1 Dr. Carlton B. Goodlett PL
Rm 458 Civil Division
San Francisco, CA 94102
(415) 554-7235

NOTICE OF LEVY UNDER WRIT OF

☒ Execution (Money Judgment) ☐ Sale

PLEASE REFER TO THIS NUMBER WHEN CORRESPONDING WITH SHERIFF. →

LEVYING OFFICER FILE NUMBER	COURT CASE NUMBER
2003307350	FJ03027MJJ

TO THE PERSON NOTIFIED (Name): Washington Mutual

GARNISHEE (Name and address)
Washington Mutual
1500 Polk Street
San Francisco, CA 94109

JUDGMENT DEBTOR (Name and address)
John P. Sutton
2421 Pierce Street
San Francisco,CA 94115

SOCIAL SECURITY NUMBER (IF KNOWN)
[redacted]

1. The judgment creditor seeks to levy upon property in which the judgment debtor has an interest and apply it to the satisfaction of a judgment as follows:
   a. Judgment debtor (name): John P. Sutton [redacted]
   b. the property to be levied upon is described
      ☐ in the accompanying writ of possession or writ of sale.
      ☒ as follows:

Any and all deposit accounts, safe deposit boxes, monies, credits, rents, debts, effects due or owing the judgment debtor in the possession or under the control of the person, business, firm, association, partnership, corporation or financial institution listed above under garnishee. This levy is made in accordance with SEC.700.040 140 or 700.160 CCP -
** Washington Mutual Bank **

2. The amount necessary to satisfy the judgment creditor's judgment is *(specify total amount due under the writ less partial satisfactions plus daily interest from the date of the writ until the date of levy)*:
   $ 5124,345.00 (The total amount due is greater than that shown because of accruing interest, Sheriff's fees, and/or costs. Contact the Sheriff's office at (415) 554-7235 for the total daily payoff amount.)
3. You are notified as (
   a. ☒ a judgment debtor.
   b. ☐ a person other than the judgment debtor *(state capacity in which person is notified)*:

(Read Information for Judgment Debtor or Information for Person Other Than Judgment Debtor on reverse.)

Notice of Levy was
- ☒ mailed on (date): 8-19-03
- ☒ delivered on (date): 8-19-03
- ☐ posted on (date):
- ☐ filed on (date):
- ☐ recorded on (date):

Signed by: J. Mirandeter
Sheriff's Authorized Agent
☒ Levying officer ☐ Registered process server

(Continued on reverse)